Synergy Gas Corp. *and* Frank Depolito. Case 2–CA–22075

March 20, 1991

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On July 17, 1990, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Synergy Gas Corp., Cold Spring, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Supplemental Order.

[1] We grant the General Counsel's unopposed motion to correct the transcript.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Margit Reiner, Esq. and *David E. Leach III, Esq.*, for the General Counsel.

Elloit J. Mandel, Esq. (Kaufman, Frank, Naness, Schneider & Rosensweig, P.C.), for the Respondent.

Wendell V. Shepherd, Esq. (Roy Barnes, P.C.), for the Charging Party.

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge. This supplemental proceeding was initiated by a backpay specification and notice of hearing dated December 30, 1988, and an amended backpay specification dated May 1, 1989. Respondent filed timely answers and this matter was heard by me in New York, New York, on May 1, July 6, August 17 and 18, and September 28, 1989.

In the underlying case, the Board issued an Order (at 290 NLRB 900) dated August 22, 1988, affirming a Decision of Administrative Law Judge Eleanor MacDonald finding that Synergy Gas Corp. (Respondent) unlawfully discharged Frank DePolito on February 4, 1987, and ordered that he be reinstated and made whole from that date until his reinstatement. DePolito was offered reinstatement by Respondent on October 20, 1988, and returned to Respondent's employ on November 11, 1988, but at a wage rate below his rate at the time of his discharge. This situation was rectified on May 16, 1989, when his wage rate was increased to the proper amount. While admitting that the wage rate paid to DePolito was less than it should have been between November 11, 1988, and May 16, 1989, Respondent defends, generally, that DePolito should be denied any backpay here because he did not make an adequate search for interim employment and because he fraudulently prepared the backpay forms submitted to the Board and fraudulently concealed interim employment and interim earnings.

FACTS AND ANALYSIS

There is one uncontested item here. A valid offer of reinstatement was made on October 20, 1988, but DePolito did not return to work for Respondent until November 11, 1988. Therefore no backpay is due for the period October 20 through November 11, 1988. However, for the period from November 11, 1988, through May 16, 1989, Respondent paid DePolito a weekly salary of $444, rather than the $481 a week he should have been paid. Absent any positive finding on Respondent's fraudulent concealment argument summarized above, at least that much ($7 times 26.6 weeks, or $984.20) is owing to DePolito.

A. *Search for Interim Employment*

The first of Respondent's defenses to be discussed here is that DePolito did not make an adequate search for interim employment. As stated, supra, DePolito was unlawfully discharged by Respondent on February 4, 1987.[1] As will be discussed more fully below, although DePolito's testimony is not a model of clarity, and is often contradictory, his partnership with William Alpi in County Wide Appliance Service (CWAS) began on about April 1; from that time, until the end of the year was a startup trial period for CWAS. Beginning in November, December, or January 1988, when Alpi left his full-time employment, both DePolito and Alpi devoted their full time to CWAS. The critical periods for DePolito's search for interim employment are therefore February 4 through about April 1 (prior to the creation of CWAS) and, to a lesser extent, April 1 through the end of the year, at which time both DePolito and Alpi devoted their full time to the operation.

DePolito filed for, and received unemployment benefits beginning within a week of his termination by Respondent. In that connection, he reported to the job service every 2 weeks where he spoke to a counselor. He registered for service mechanic or plumbers' helpers positions. The counselor had a computer, but with one exception, all the jobs that DePolito found interesting paid $6 or $7 an hour, about half what he had been earning with Respondent. The other job was with Grand Union; by the time the counselor called, it was no longer available. DePolito testified that he went to the job service more often than the required (every 2 weeks) number of times and went there on two or three occasions after his benefits ended. In addition, DePolito looked through

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1987.

the help wanted section of the daily local newspaper every day as well as the Pennysaver, which is published weekly. He called some of the places listed in these newspapers, but all except one were paying $6 or $7 an hour and he applied no further. The only employer whom he could recollect that he learned of through the newspapers was Appliance Plus; DePolito testified that he thought they were looking for a repairman. When he went to their facility, he learned that they were interested in a deliveryman ''I wasn't interested . . . so I didn't take the job.'' He testified that he remembers that employer because he went there to ask about the job; the others he simply called and only knew of the telephone number since the employer's name is usually not listed in the newspaper.

In addition to the above, DePolito sought the assistance of Teamsters Local 456 (the Union) (which had been involved in the underlying matter) in obtaining interim employment. Beginning in about March, he called the Union about every other day, but obtained no jobs; he was told that there were no jobs because it was the slow season. Edward Doyle, the Union's secretary-treasurer, business manager, testified that DePolito called the Union about two or three times a week (although he, personally, spoke to him once or twice a week), but he kept no records of these calls. The Union was unable to provide him with any jobs because construction in the area was slow and there were no jobs available over the employees in the Union with seniority.

DePolito also contacted friends and acquaintances to assist him in locating interim employment. In this manner, he contacted the following: Rockland Appliance, but no jobs were available; Tri-County and Resco, both restaurant supply houses, but no jobs were available there either; DiMarsco Pontiac, but nothing was available there, as well. In addition, he knew the owner of New York Finest Security which, he testified, pays security guards $15 an hour. He met the owner and asked about a job. He was told that he would get back to him; he never did. Shortly thereafter, DePolito called him again and asked him if there were any jobs available; he said that he would call him if something became available, but he never did. In addition, DePolito fixed the dryers of two friends—Ken Garon in the second quarter of 1987 for $35 and Tony Toaphah in the third quarter of 1987 for $50.

In addition to the above, beginning in about December, he was given a rent free house to live in at Lost Lake, in exchange for which he did security. Lost Lake is a community consisting of 28 cabins. Almost all the residents live there only on weekends, thereby requiring some security during weekdays. At the end of each day, DePolito or his wife checked each cabin to be sure that they had not been disturbed; this took about 45 minutes. In exchange for this, he received the use of a house rent free. Other than the above, the only interim employment for DePolito was CWAS, which began about April, but was not in full operation until about January 1, 1988.

When loss of employment is caused by a violation of the Act, the finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 175–176 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden for the backpay proceeding is ''to show the gross backpay due each claimant.'' *J. H. Rutter-Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973). Once the General Counsel has established gross backpay, the burden is on respondent to establish affirmative defenses that would mitigate its liability. *NLRB v. Brown & Root, Inc*., 311 F.2d 447, 454 (8th Cir. 1963). Respondent has the burden of establishing such matters as unavailability of jobs, willful loss of earnings, and interim earnings to be deducted from the backpay award. *NLRB v. Mooney Aircraft,* 366 F.2d 809, 812–813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp*., 204 NLRB 1068 (1972). Innumerable cases, by now, have stated that an employer can mitigate his backpay liability be establishing that the claimant willfully incurred losses by failing to adequately search for interim employment or by unjustifiably refusing to accept new employment; this is, of course, an affirmative defense and it is the employer's burden to establish these facts. The mere fact that an individual had little or no success in locating interim employment is not enough to satisfy this burden; rather the employer must affirmatively demonstrate that the employee ''neglected to make reasonable efforts to find interim work.'' *NLRB v. Coca Cola Bottling Co*., 360 F.2d 569, 575 (5th Cir. 1966). Additionally, a discriminatee is held only to reasonable exertions in this regard, not to the highest standards of diligence. In determining the reasonableness of a discriminatee's efforts, the employee's skills and qualifications, his age and labor conditions in the area are factors to be considered. *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644 (1976).

Within a few days of his termination DePolito had registered for unemployment and began speaking to the counselor about available positions. With the exception of the Grand Union job, which was no longer available, all the other positions paid about half what he had earned with Respondent. At least, during this initial period of search for interim employment, a discriminatee is not required to ''lower his sights'' and accept employment at half his pretermination wage rate. *Sioux Falls Stock Yards Co*., 236 NLRB 543, 562 (1978). In addition to seeking employment through the counselor at unemployment, DePolito made calls to employers listed daily in the local newspaper and weekly through the Pennysaver. The fact that he could only recollect one employer (Appliance Plus) whom he contacted in this manner does not detract from his attempts or his credibility. Rather, it comports with my observation of DePolito as a generally credible, but inexact individual (as will be discussed more fully below). In addition, DePolito testified to five other specific employers whom he solicited for work, all unsuccessfully. My observation of DePolito convinces me that his inability to name other employers does not mean that he did not apply to others; rather, like his bookkeeping methods (or the lack thereof) described more fully below, he kept few, if any, records. In addition to the above, beginning shortly after his termination, DePolito sought the assistance of the Union in obtaining employment (surprisingly unsuccessfully) and beginning about April 1, he devoted part of his time and, beginning about January 1, 1988, devoted his full time to CWAS. In *Heinrich Motors*, 166 NLRB 783 (1967), the Board stated: ''That self employment is an adequate and proper way for the injured employee to attempt to mitigate loss of wages hardly requires citation . . . and a claimant in that category need not seek other employment.'' In *NLRB v.*

Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955), the court stated: ''But the principal of mitigation of damages does not require success; it only requires an honest good faith effort.'' Here too, as will be seen more fully below, there is no evidence that DePolito and (later) Alpi gave less than an honest, good-faith effort to make a success out of CWAS; the fact that they were unsuccessful in this does not detract from their efforts or DePolito's backpay. I therefore find that Respondent has not satisfied its burden of establishing that DePolito made an inadequate search for interim employment.[2]

B. *CWAS and the Alleged Fraudulent Concealment*

On April 1, DePolito and Alpi executed a General Partnership Agreement stating that the business, appliance service, will be carried on at 245 Arthur Street, Peekskill, New York (DePolito's address at the time), and that each will have a 50-percent interest in the Company. CWAS was operational (in different degrees) between that time and November 30, 1988, when DePolito and Alpi executed an Agreement to Dissolve Partnership.

Up through the first day of hearing, all the evidence and testimony was that DePolito and Alpi began operating CWAS on about January 1, 1988. That is what DePolito told the Region's compliance officer in August 1987 and what DePolito testified to, on numerous occasions, on May 1, 1989. However, as a result of a thorough investigation by counsel for Respondent (together with the fruits of numerous subpoenas), it soon appeared that CWAS was begun in about April. When DePolito was recalled to testify on September 28, 1989, he was asked why he withheld testimony that they began the operation earlier. He testified: ''I didn't withhold anything. I didn't make any money in 1987.'' A few minutes later he was asked:

> Q. Mr. DePolito, can you tell me why your testimony previously was that this company didn't start working until January 1988?
> A. Sure.
> Q. Why?
> A. It didn't make any money.

When questioned further, he testified: ''I don't know what the legal term is to starting a business.''

Alpi was also questioned about this discrepancy in DePolito's testimony. He was asked whether DePolito's testimony that CWAS began in January 1988 was incorrect. He testified, ''It was between July and December that the business—to me and Frank, was a trial situation . . . we didn't make any money. What we put in, went out. I don't know the legal aspects of whether you consider someone in business or not.''

Counsel for Respondent, in his brief, repeatedly argues that DePolito should be denied backpay because he fraudulently concealed the existence of CWAS for the period prior to January 1, 1988, alleging that DePolito (together with his accountant/attorney, Brian Eisen), ''attempt[ed to perpetrate a fraud upon Region 2, the Administrative Law Judge, and the Respondent.'' There is no question that the information DePolito supplied to the Region in 1988, and his testimony on the first day of the hearing was incorrect and resulted in confusion and the lengthening of the hearing. In *American Navigation Co*., 268 NLRB 426 (1093), the Board stated:

> We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices. This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, though inadvertence fails to report earnings.

In a footnote to this statement, the Board states that it is confident that the judges are capable of distinguishing honest error from deceit. In *Ad Art, Inc*., 280 NLRB 985 (1986), the Board reaffirmed the principle of *American Navigation*, and added that the Board would ''deny all backpay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimants deception.'' In *Allied Lettercraft Co*., 280 NLRB 979 (1986) (decided the same day as *Art*) the administrative law judge stated: ''The Board will only cut off backpay for deliberate and perfidious misrepresentations.''

It should initially be noted that *American Navigation* and *Ad Art* refer to ''concealed earnings''; what is present in this matter is not concealed earnings, but unreported employment by CWAS. The unrebutted testimony of DePolito, Alpi (whose credibility, even, Respondent does not attack), and the documentary evidence establishes that CWAS (and, correspondingly, DePolito and Alpi) did not make any money in 1987; rather it lost money during the period April 1 through December 31. As there were no earnings, there was nothing to fraudulently conceal. In addition, in *American Navigation*, the Board distinguished between willful deception and inadvertence and deceit from honest error. I find that DePolito's failure to mention CWAS' existence at an earlier time was not the result of willful deception or a deliberate misrepresentation. Rather, I find that it was the result of inadvertence. This is supported by my observation of DePolito for the substantial period of his testimony, together with the testimony itself. This reveals an individual with a mediocre (at best) memory attempting to recollect events that occurred 2 years earlier. Even worse than his memory was his bookkeeping habits; he testified, for example, that he does not know if he had a checking account in 1987 and 1988 and: ''I don't keep track of my bank statements and stuff like that.'' In what was the understatement of the hearing, DePolito testified: ''I'm very bad with books.'' Alpi was an extremely credible witness, but only a little better when it came to recordkeeping; when he and DePolito created CWAS in April, they had a lot of enthusiasm, but little knowledge and experience with operating a business. In this regard, CWAS failed to file a tax return for 1987. I found Alpi to be an extremely credible witness who had nothing to gain in this proceeding and his testimony further convinces

[2] I find that the rent free house DePolito received at Lost Lake is not considered an offset against his backpay. At the time both he and Alpi were devoting their full time to CWAS. The responsibilities at Lost Lake only took about 45 minutes daily (apparently, it could be performed day or night) and either he or his wife could do it.

me that DePolito was a credible witness,[3] albeit, one who was unlikely, to be appointed to be chancellor of the Exchequer. Respondent therefore has not sustained its burden of establishing fraudulent concealment by DePolito.

There are a number of other allegations made by counsel for Respondent which he claims should disqualify DePolito from receiving backpay from his client. One is that there is a conflict in the information that DePolito and Eisen gave to the Region's compliance officer, Reinertsen. When Reinertsen originally met with DePolito and Eisen on August 31, 1988, Eisen gave her a computer printout stating: ''County Wide Appliance Service, Cash Receipts/Cash Disbursements 12/31/88.''[4] This printout lists the following draw for DePolito from January through July 1988, chronologically: $1006, $800, $300, $605, $400, $100, and $100. By letter dated November 16, 1988, Eisen wrote, inter alia, to Reinersten: ''Enclosed, please find the documents which you requested involving Frank DePolito.'' Enclosed was a computer printout with the same caption as the prior one turned over on August 31, 1988; the only changes were for January 1988. The latter printout listed no draw for DePolito, and made some changes in disbursements, merchandise, and general expenses for CWAS, as well. Reinertsen testified that at the August 31 meeting, Eisen told her that the printout was a temporary sheet and that he would give her a new form when he ''redid'' the books. DePolito testified that he cannot explain why the August 31, 1988 printout states that he received a draw of $1006 in January 1988, while the later printout states that he received no draw in that month. He testified that he did not get any draw in that month. Counsel for Respondent also refers to the difference between the interim earnings on the original backpay specification and the amended specification to illustrate the alleged fraudulent concealment by DePolito. They follow:

Period/Qtr.	*Original Spec. Source/Amt.*	*Revised Spec. Source/Amt.*
1987		
1st	None	None
2d	Garon—$35	Garon—$35
3d	Toaphah—$50	Toaphah—$50
4th	None	None
1988		
1st	CWAS—$1100	CWAS—$1200
2d	CWAS—$1105	DCWAS—$1100
3d	CWAS—$100	CWAS—$500
4th[5]	CWAS—None	CWAS—$350

Eisen testified that he is not certain why the figures given to Reinertsen in November 1988 are different than the figures originally given at the August 31, 1988 meeting. However, he testified that he ''might have reviewed some of the substantiation and back-up in a review in preparation for whatever I was doing and I might have made changes.'' He testified that November printout is accurate.

I have previously discussed the credibility of DePolito and Alpi. Eisen, who lists his occupation as tax preparer, accountant, lawyer, mortgage broker, and real estate broker was evasive, uncooperative, and a totally obnoxious witness. However, that, alone, should not detract from the General Counsel's case, and I find no positive evidence from Eisen's testimony to establish that the preliminary errors in this matter was due to anything more than inadvertence or incompetence, and that they were corrected during the hearing. Counsel for Respondent argues in his brief: ''The General Counsel has clearly admitted through the Amended Backpay Specification that DePolito concealed employment in the third and fourth quarter of 1987, the first, third and fourth quarter of 1988.'' I do not understand the initial portion of this argument as there was no change in the specs for the third and fourth quarter of 1987—$50 and none. The total change for the first, third, and fourth quarter of 1988 is minimal $850 and my observation of the witnesses convinces me that it was the result of inadvertence rather than willful deception.

Another point raised by counsel for Respondent in his brief was that the CWAS 1988 tax return was a sham and was part of the overall effort to perpetrate a fraud on the NLRB; I reject this as well. It is true, of course that, even though CWAS did not make a profit in 1987, the partners were still obligated to file tax returns for the year. However, their failure to do so in the instant situation further reestablishes their inexperience and lack of sophistication in the area. It certainly cannot be considered as an attempt to perpetrate a fraud on the NLRB; rather, if CWAS has made a profit for the period it might be considered an attempt to perpetrate a fraud on the IRS.

C. *DePolito's Interim Earnings*

The amended backpay spec lists DePolito's interim earnings from February 4 through his reinstatement as $3235 (although the spec lists it by quarters, of course); all but $85 of this was earned through CWAS in 1988. While not denying, at least, this much in interim earnings, counsel for Respondent argues that DePolito's interim earnings were really substantially more than this. In *NLRB v. Brown & Root, Inc*., supra, the court stated that ''in a backpay proceeding, the burden is on the General Counsel to show the gross amounts of back pay due. When that has been done, however, the burden is on the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.'' In *A & T Mfg. Co*., 280 NLRB 916, 917 (1986), the administrative law judge stated: ''The burden of proving any mitigation of damages is on Respondent herein, and any uncertainty is resolved against the wrongdoer whose conduct made certainty impossible.''

[3] An additional factor supporting DePolito's credibility (as pointed out in counsel for the General Counsel's brief) is that it was not until about the time that the hearing commenced that DePolito informed counsel for the General Counsel that the salary Respondent paid him on his return to its employ was less than he had previously been receiving before being unlawfully terminated by Respondent, as discussed, supra. As counsel for the General Counsel states in her brief, only poor recordkeeping or poor memory could account for this omission, which could mean more money for him.

[4] It was not explained why this printout was dated 4 months after the meeting.

[5] The original spec did not list any interim earnings at Respondent for the fourth quarter of 1988 because the Region assumed that his backpay ended at that time upon reinstatement. Only later, when it was revealed that he was taken back at a lower salary than he previously had, did the amended spec have to list his interim earnings with Respondent together with his gross backpay, in order to show the deficiency.

This is a burden that is difficult to surmount. Because DePolito, Alpi, and Eisen were able to produce so few of CWAS' records, counsel for Respondent subpoenaed, and obtained, numerous of these records. Some of these records establish that checks made out to CWAS for work performed were deposited directly into DePolito's bank account. Counsel for Respondent argues that this amount represents additional interim earnings for DePolito.

For example, the record establishes that in 1987, CWAS wrote checks to DePolito in the amount of $1006; during about the same period (ending in December) customer checks, in the amount of $1916, apparently,[6] for services rendered by CWAS, were deposited directly into DePolito's bank account. However, it is clear that CWAS was a company, like other companies, that required capital to get started, and the capital was contributed by DePolito and Alpi on a 50-50 basis. Although the CWAS records are sometimes difficult to read and interpret, it is clear that CWAS lost in excess of $5000 in 1987, and DePolito's contribution to CWAS in that period exceeded the above-mentioned sum that he received from CWAS and its customers. I therefore find that Respondent has not sustained its burden of establishing that DePolito's interim earnings were in excess of those set forth in the amended backpay specification for either 1987 or 1988.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Synergy Gas Corp., Cold Spring, New York, its officers, agents, successors, and assigns, shall pay to Frank DePolito the sum of $41,549 plus interest to be computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] The difficulty in this analysis is that the copies of the checks sent by the bank are, often, difficult to make out and it is impossible to differentiate between checks made out to DePolito for service rendered, and personal checks of DePolito, and his wife.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.